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In The

Supreme Court of the United States

October Term, 1977

No. 77-1296

UNITED STATES NAVIGATION INC.,

and

SCINDIA STEAM NAVIGATION CO., LTD.,

Petitioners,

vs.

JOHN ESPOSITO,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The Court of Appeals unanimously affirmed the unreported judgment of the district court *on the opinion* of Chief Judge Jacob Mishler.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

STATEMENT

The instant case which petitioners desire to bring before this Court for review involves little more than a tort claim by respondent John Esposito, a longshoreman, who sued to recover damages for the personal injuries he sustained while working aboard a barge. Cargo was in the process of being discharged from a Scindia ship onto the barge on which respondent was working as part of a continuous operation, then to be transferred to another Scindia vessel berthed nearby. Petitioner United States Navigation had possession of the barge under a hiring for an indefinite term over which it exercised sole and exclusive dominion and control. The district court found, on the facts, that United States Navigation was a demise charterer of the barge with the concomitant duties of owner *pro hac vice* (5a),[1] the predicate for its liability to respondent for the personal injuries he sustained due to the unseaworthy condition of the barge. The court also held Scindia liable as the principal for whom United States Navigation was agent.

The issues before the trial court (non-jury) were just another instance of an injury to a longshoreman who derived his right of action from *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1090 (1946), and the plethora of cases that followed, including *Gutierrez v. Waterman Steamship Corp.*,

1. Refers to page number in appendix to petition.

373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 297 (1962), and others, which extended the shipowner's liability shoreward to the pier, and beyond.

This case presents no questions of import to bring it within the ambit of those considerations governing review on certiorari as outlined in Rule 19 of the Rules of the Supreme Court; nor is any factual aspect of the case, or the opinion of Chief Judge Jacob Mishler, novel, unique, of first impression or of public interest warranting intervention at this stage of the judicial process.

Moreover, petitioners' contentions and supporting arguments have already been considered four times, once before Chief Judge Mishler, and on three separate occasions by the circuit court of appeals — a distinguished bench. More recently, an application for a stay presented to the Hon. Thurgood Marshall was also denied.

ARGUMENT

RESPONDENT'S REASONS FOR DENIAL OF THE WRIT (COMMENTING ON PETITIONERS' POINTS)

"I."

If, *arguendo*, petitioner United States Navigation is correct in its assertion that the question it raises has commercial importance — namely, its need, and that of shipping agents similarly situated, to now obtain insurance coverage to protect themselves against non-negligent liability for pre-demise unseaworthiness, I direct the Court's attention to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, Ch. 509 §1, 44 Stat. 1424, which renders this issue moot.

The accident at bar occurred March 18, 1969, and because the 1972 amendments to §905 were not applicable to injuries

sustained prior to the effective date of the amendments (*Scalafani v. Moore McCormack Lines, Inc.*, 388 F. Supp. 897 (D.C.N.Y. 1975), *aff'd.*, 535 F.2d 1242; *Reyes v. Marine Enterprises Inc.*, 494 F.2d 866 (1st Cir. 1974)), the long line of cases involving injuries to longshoremen to whom was owed the duty to provide a seaworthy vessel pertained.

The purpose of the 1972 amendments was to relieve vessels of liability to longshoremen for damages under the admiralty doctrine of unseaworthiness and to eliminate the vessel's action for indemnity against the stevedoring company. The reference to "vessel" in §905(b) includes not only the vessel itself, but its owner, owner *pro hac vice*, agent, operator, charter or bare boat charterer, master, officer or crew members §18(b), 33 U.S.C. §902(21).

Therefore, petitioners' argument that commercially important questions are raised which should be settled is of no consequence because the longshoremen can no longer sue for non-negligent injuries or for pre-demise unseaworthiness.

In regard to the issues presented herein, it is settled law that charters of barges without motor power, in local harbors, are demises, from which it naturally follows that the demisee is looked upon as the owner *pro hac vice* of the barge. The charterer is therefore subject to all of the duties and responsibilities of ownership and stands liable in personam for a breach of its duty to provide a seaworthy vessel and a reasonably safe place to work. *Dailey v. Carroll*, 248 Fed. 466 (2d Cir. 1917); *The Willie*, 231 Fed. 865, 152 C.C.A. (2d Cir. 1916); *Hastorf v. F. R. Long — W. G. Broadhurst Co.*, 239 Fed. 852 (2d Cir. 1917); *Leary v. United States*, 14 Wall 607, 81 U.S. 607, 20 L. Ed. 756.

In the case at bar, the district court found, as a fact, that United States Navigation was in possession and control of the barge for nineteen (19) days and entitled to divert its navigation

and employment, which it did (4a). As an owner *pro hac vice*, United States Navigation had the duty to furnish a seaworthy barge and the concomitant obligation to provide longshoremen, such as respondent, with a safe place to work. The district found that it breached this duty. The issue was uncomplicated and the findings supported by ample precedent.

The cases to which petitioners allude are inapposite for they relate to self-propelled navigational vessels and are otherwise distinguishable on the facts. Petitioners misconceive that a special rule of law applies to barges, which, in the opinion of *Dailey v. Carroll, supra*, rests on "the nature and exigencies of harbor business only."

"II."

The district court could have relied on alternative principles of law in the imposition of liability as to Scindia (shipowner), *i.e.*, the longshoreman (respondent) was working in the service of the ship performing an integral part of the unloading of petitioners' cargo vessel. *The Pennsylvania Railroad Company v. McAllister Brothers, Inc.*, 137 F. Supp. 788, *aff'd*, 240 F.2d 423 (2d Cir. 1957)[2]; *Hagans v. Ellerman & Bucknall Steamship Co.*, 318 F.2d 563 (3d Cir. 1963). Instead, Chief Judge Mishler applied the law of agency (5a) and held Scindia liable for its agent's acts which were performed within the scope of its agency — basic "hornbook law". There is nothing remarkable about this concept to invite further judicial intervention.

"III."

The thrust of petitioners' argument to justify review by this Court is what they choose to refer to as a summary affirmance by the court of appeals, but neglect to include the critical words: "on the opinion of Chief Judge Mishler below."

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2. In the district court action, on substantially similar facts, the predecessor law firm to petitioners' present attorneys admitted liability to the longshoreman.

If the circuit court recited Judge Mishler's opinion verbatim, and concluded with the words: "Appellants contentions are without merit. Affirmed.", could it be said that the court rendered a summary affirmance?

It is undisputed that there is an ever-increasing caseload of federal judicial business, especially in the Second Circuit. This monumental task has led to the promulgation of Rule §0.23 which, in the proper case, authorizes a summary disposition. This is not to say that a summary affirmance is indiscriminately rendered; there is a careful judicial screening and safeguards to assure the proper disposition of a case. As was stated in *N.L.R.B. v. Amalgamated Clothing Workers of America,* 430 F.2d 966 (5th Cir. 1970):

> ". . . in a number of cases there is no real need for an opinion at all. Where in a given case that is the considered judicial judgment of three Judges comprising a panel, then it is perfectly obvious that the now limited and precious judicial resources can be husbanded by a procedure which eliminates that unnecessary opinion."

The Supreme Court is faced with an even more gargantuan burden with the inordinate number of petitions for a writ of certiorari and can well appreciate the necessity to screen the cases to ascertain those that have precedential value. In the words of Mr. Justice Rehnquist in the case of *Taylor v. McKeithen,* 407 U.S. 191, 32 L. Ed. 2d 648, 92 S. Ct. 1980:

> "I think decisions as to whether opinions should accompany judgments of the courts of appeals, and the desirable length and content of those opinions are matters best left to the judges of the courts of appeals."

The ultimate question, therefore, is not whether the court of appeals has too much latitude, but whether the particular case is an appropriate candidate for elucidation.

In the case at bar, the circuit court of appeals did express its views when it adopted the opinion of Chief Judge Mishler.

It is evident that petitioners have failed to present a convincing argument that this case involves questions or principles of law important to others than the parties litigant. The decision below does not involve a precedential question of federal law which should be settled by this Court; the questions of law are not of public importance or affect large public interests, and, more significantly, the issues have been moot since the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Succinctly stated, Rule 19 has not been satisfied.

CONCLUSION

For the enumerated reasons, which have eroded petitioners' arguments, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ L. Richard Fodera

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